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No.

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IN THE

# Supreme Court of the United States

October Term, 1971

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MURRAY TILLMAN, *et al.*,
*Petitioners,*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *et al.*,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

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[1] Petitioners, in addition to Murray Tillman, are Rosalind N. Tillman, his wife, Dr. Harry C. Press and Francella Press, his wife, and Mrs. Grace Rosner. Respondents, in addition to Wheaton-Haven Recreation Association, Inc., are Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, Richard E. McIntyre, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr. and James M. Whittles, individuals who were officers and/or directors of said corporation at times material herein.

## OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, pp. B-1-31) is reported at 451 F.2d 1211. The district court's opinion is unreported (App. C, *infra*, pp. 1-13).

## JURISDICTION

The judgment of the court of appeals was entered on October 27, 1971. A petition for rehearing and suggestion for rehearing *en banc* was duly filed, and the court of appeals entered its order of denial on December 16, 1971 (App. D, *infra*, D-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the court of appeals erred in holding a community recreation association to be a private club and hence exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C. §§ 1981, 1982 and 42 U.S.C. § 2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with virtually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a). They are set forth in App. A, *infra*, pp. A-1-2).

## STATEMENT[2]

### A. WHEATON-HAVEN RECREATION ASSOCIATION, INC. – ITS PURPOSE AND MANNER OF OPERATION

Wheaton-Haven Recreation Association, Inc. is a non-profit Maryland corporation organized in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland. The pool was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a $375 initiation fee and an annual dues of $150-$160. The by-laws of the association provide that membership "shall be open to bonafide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (by-laws, art. III, §1).[3] Members may be taken from outside the three-quarter mile radius upon the recommendation of a member as long as members from outside the area do not exceed 30 percent of the total membership.[4] In either event, applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose" (by-laws, art. III, §3).

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[2] The facts stated herein are based on the district court's findings as modified by the court of appeals.

[3] Wheaton-Haven's by-laws (Def. Exh. 1) are contained in the appendix to appellants' brief in the court of appeals.

[4] At times when the membership rolls are full, applicants for membership are limited to the geographic area within a three-quarter mile radius of the pool, and such applications are considered in chronological order of receipt (by-laws art. III, §3).

Membership, which is by family units rather than by individuals, is limited to 325 families. If a member who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors (by-laws, art. VI).

Only members and their guests are admitted to the pool. Members of the general public cannot gain admittance by payment of an entrance fee.

The Wheaton-Haven pool was constructed in 1958-1959 by a contractor from outside the State of Maryland. The pool's operation involves the use of pumps, a motor and a chlorine feeder, all manufactured outside of Maryland. There are also snack vending machines. All of these facilities are in an enclosed area accessible only to members and their guests.

The pool was constructed pursuant to a "special exception" granted by the Montgomery County Board of Appeals under the county's zoning ordinance.[5] Prior to granting the exception, the zoning authority required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed.

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[5] The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955. In the ordinance, the Council stated, ". . . this action sets up the community swimming pools as a special exception . . . Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development" (Admiss. Nos. 1, 2, Pl. Exh. 2).

Wheaton-Haven pays state and local property taxes, but is exempt from state and federal income taxes under Maryland Code Ann. Art. 81, §288(d)(8), and section 501(c)(7) of the Internal Revenue Code (26 U.S.C. §501(c)(7)) exempting non-profit, member-owned and controlled recreational facilities.

## B. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY MEMBERSHIP AND GUEST POLICIES

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of Wheaton-Haven. In the spring of 1968, Dr. Press sought to obtain a membership application from members of the association's Board of Directors, who declined to furnish him with an application. The stipulated reason for their refusal was his race.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. On July 19, 1968, the Tillmans brought Mrs. Grace Rosner, a Negro, to the pool as their guest. She was admitted. The following day, at a special meeting, the Board of Directors promulgated a rule limiting guests to relatives of members. Mrs. Rosner has been refused admission as a guest of the Tillmans since then. The new guest policy was adopted in response to the Tillman's bringing a Negro guest to the pool, though it was intended also to reduce the burgeoning number of guests using the pool.[6]

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[6] At a meeting of the association's members in the fall of 1968, a resolution was adopted reaffirming Wheaton-Haven's policy of not admitting Negroes to its facilities.

## C. RELIEF SOUGHT AND PROCEEDINGS BELOW

Petitioners seek declaratory and injunctive relief, as well as damages. Dr. and Mrs. Press claim that Wheaton-Haven's denial of membership to them because of race violates their rights under 42 U.S.C. §§1981, 1982 on the ground that purchase of a membership share involves making a contract, and also that membership in the nonstock corporation constitutes personal property.[7] Since the availability of membership in the association, in addition, is an asset which enhances the value of homes in the neighborhood, and entitles the member to convey a first option to membership to the purchaser of his home, Dr. and Mrs. Press' inability to acquire a membership also deprives them of real property interests which are available to white persons. Mr. and Mrs. Tillman base their claim for relief on the ground that their membership in the Wheaton-Haven association is both a contract and a property interest which, under 42 U.S.C. §§1981, 1982, may not be impaired for racial reasons.[8] Finally, Mrs. Rosner claims violation of her rights under 42 U.S.C. §§1981, 1982, since as the guest of the Tillmans, she has an enforceable interest as a third party beneficiary of the Tillman's membership contract, or, viewing their membership as property, she has an implied easement of ingress and egress, or a license, which constitutes property.[9]

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[7] See *Hyde v. Woods*, 4 Otto 523 (1877); *Page v. Edmunds*, 187 U.S. 596 (1903).

[8] See *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 237 (1969); *Walker v. Pointer*, 304 F. Supp. 56, 58-61 (N.D. Tex., 1969).

[9] See *Walker v. Pointer, supra*, 304 F. Supp. at 60-62; *Collyer v. Yonkers Yacht Club*, 17 A.D. 973, 234 N.Y.S. 2d 259 (1962); Restatement (Second) of Torts, §§330, 332 (1965); 17 Am. Jur. 2d, Contracts, §§302-319.

Petitioners also base their claims for relief on the Civil Rights Act of 1964 (42 U.S.C. 2000a) which prohibits racial discrimination in any "place of public accommodation," defined in the statute to include any "place of entertainment" affected by state action or where interstate commerce is involved. Since Wheaton-Haven was constructed by a contractor from outside the State of Maryland and operation of the pool involves the use of machinery and equipment manufactured in other states, the necessary link to interstate commerce is present, thus bringing the facility within the definition of a "place of public accommodation" as contained in the 1964 Act.[10]

The district court denied the relief sought by plaintiffs, and granted summary judgment to defendants below (App. C., *infra*, pp. C-1-13). Before the court of appeals, plaintiffs' motion for summary reversal was denied, and following consideration of the merits, a majority of the panel (Haynsworth, Chief Judge, and Boreman, Circuit Judge) affirmed the district court, holding that Wheaton-Haven is a "private club" and hence exempt from the Civil Rights Act of 1866 as well as the Civil Rights Act of 1964 (App. B, *infra*, pp. B-1-23). Judge Butzner, dissenting, would have granted plaintiff's motion for summary reversal of the district court. He found the case to be "indistinguishable in all material aspects" from *Sullivan v. Little Hunting Park, supra*, and hence termed the majority decision "a marked departure from authoritative precedent" (App. B, *infra*, p. B-23). Judges Winter and Craven dissented from the court's denial of rehearing

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[10] See *Daniel v. Paul*, 395 U.S. 298 (1969); *United States v. Central Carolina Bank & Trust Co.*, 431 F.2d 972 (C.A. 4, 1970).

*en banc*, expressing their agreement with Judge Butzner's view that the case is indistinguishable from *Sullivan* (App. B, *infra*, p. B-31). Finally, all three dissenting judges deplored the majority's holding that the 1866 Act was impliedly repealed in part by the 1964 Act. (See discussion *infra*, pp. 14-15, n. 15.)

## REASONS FOR GRANTING THE WRIT

The court of appeals' decision sanctions racial discrimination in circumstances in which this court specifically held it to be unlawful. The decision is in square conflict with *Sullivan v. Little Hunting Park*. Because the court of appeals failed to follow the controlling precedent of that case, its decision should be reversed.

Both this case and *Sullivan* involve voluntary associations organized by residents of a neighborhood to provide recreation facilities, principally a swimming pool, for themselves and others in the area. In each instance, purchase of a membership share entitles all persons in the immediate family of the shareholder to use the association's facilities.[11] In neither case did the association pursue a policy of exclusiveness or selectivity in admitting

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[11] Cooperatively established recreation associations organized to operate neighborhood swimming pools are particularly common in areas where public swimming pools and beaches are not readily accessible. Petitioners' brief to this Court in the *Sullivan* case (p. 24) noted that in the Northern Virginia suburbs of Washington, D.C., where Little Hunting Park is located there are about 50 community pool associations; there are about 42 such associations in Montgomery County, Maryland, where Wheaton-Haven is located. Source: *The Washington Post*, p. A-20, June 12, 1967; *The (Washington) Evening Star*, p. B-1, Noon edition, April 25, 1969.

members until a black resident of the neighborhood sought the privileges of membership for himself and his family. In *Sullivan*, as here, the court below held that the association could properly exclude the black applicant on the ground that the association was a "private club." However, this Court in *Sullivan* reversed the lower court, and rejected the claim that Little Hunting Park was free to discriminate on racial grounds because it was a private club. In terms equally applicable to Wheaton-Haven, the Court stated (396 U.S. at 236):

> [W]e find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race.

*Sullivan*, and its predecessor, *Jones v. Mayer Co.*, 392 U.S. 409 (1968), establish beyond question that the Civil Rights Act of 1866 reaches beyond state action and is a prohibition against private discrimination based on race in many circumstances where it had previously been considered lawful. The 1866 statute, by its terms, bars racial discrimination in a variety of transactions involving identifiable contract or property interests. Hence, the courts eschewing "a narrow construction of the language" of the Act, as this Court advised in *Sullivan* (396 U.S. at 237), have enforced the statutory provisions to prohibit private discrimination in employment (*e.g.*, *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (C.A. 5, 1971) and cases cited therein, cert. denied Feb. 22, 1972; *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 758-760 (C.A. 3, 1971); *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442 (C.A. 3, 1971); *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 481-488 (C.A. 7, 1970), cert. denied,

400 U.S. 911), in housing (*e.g., Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (C.A. 5, 1970), 444 F.2d 143 (C.A. 5, 1971)); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349 (C.A. 7, 1971); *McLaurin v. Brusturis*, 320 F. Supp. 190 (E. D. Wis., 1970); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex., 1971)); in admission to an outdoor recreational facility (*Scott v. Young*, 421 F.2d 143, 145 (C.A. 4, 1970), cert. denied, 398 U.S. 929, in admission to a trade school (*Grier v. Specialized Skills, Inc.*, 326 F.Supp. 856 (W.D.N.C., 1971)), and in the purchase of a cemetery plot (*Terry v. Elmwood Cemetery*, 307 F.Supp. 369 (N.D. Ala., 1969)).

The foregoing authorities as well as others interpreting the Civil Rights Act of 1866 stem from this Court's holding in *Jones v. Mayer Co., supra*, that the 1866 law demonstrates a Congressional intent "to prohibit *all* racially motivated deprivations of rights enumerated in the statute . . ." (emphasis in original) 392 U.S. at 426. The *Sullivan* decision likewise reflects observance of this principle. However, the court of appeals' decision herein constitutes a rejection of the principle. Indeed, the court's refusal to follow *Sullivan* represents a rejection of the fundamental principle of *stare decisis* upon which our legal system is based.

Faced with the compelling precedent of *Sullivan*, and the unassailable conclusion of Judges Butzner, Winter and Craven, in dissent, that this case is indistinguishable from *Sullivan*, the court of appeals' majority assumed differences between the two cases where in fact none exist, and constructed a false factual analysis of the two cases to support its determination not to be bound by *Sullivan*. [12]

[12] The Court of Appeals did not rely on the district court's rationale for determining that Wheaton-Haven is a private club, but instead stated its own factual grounds to support its conclusion.

1. The court of appeals made the *clearly erroneous* assumption that Little Hunting Park's recreation facilities, which were involved in *Sullivan*, were built by the same real estate developers who built the subdivisions named in that organization's by-laws, and that therefore the right to use those facilities is incidental to the acquisition of a lot in one of those subdivisions (App. B, *infra*, pp. B-9, n. 8, B-16). The record of the *Sullivan* proceeding in this Court was before the court of appeals and the court's attention was called to the fact that there was no connection between Little Hunting Park and any commercial builder, and that the association there, like Wheaton-Haven, is a voluntary organization formed by residents of an area who joined together to build and operate a neighborhood recreation facility. [13]

2. The court of appeals made the *clearly erroneous* finding that the option to buy a membership in Wheaton-Haven which the purchaser of a home obtains when his vendor resigns his membership is "utterly without use or value" (App. B, *infra*, p. B-13). The court arrived at this finding by erroneously relying on the unsubstantiated claim of defendant's counsel at oral argument that Wheaton-Haven's membership had been 260 families for several years, less than its maximum limit of 325 (App. B, *infra*, p. B-2, n. 1). The Court reasoned that the option has no value unless the membership rolls are full. When it was pointed out in the petition for rehearing that the membership rolls were full to the 325 maximum in the spring of 1968 when Dr. Press sought to be put on the waiting list, the court corrected its findings

[13] *Sullivan* Supreme Court Appendix 24-36, 45. The printed Appendix to the briefs which was used in this Court in *Sullivan* was submitted to the court of appeals, and the majority opinion cites several facts about that case which are ascertainable only from the Appendix.

to reflect full membership at that time (App. B, *infra*, p. B-30). However, the court did not alter its conclusion that the option is of no use or value. The court's adherence to its conclusion, despite the demonstrated error of its underlying factual finding illustrates the narrow approach taken by the court to this case. Its opinion is based on previously arrived at determinations, and facts are fashioned to provide their justification. In point of fact the question of whether Wheaton-Haven's membership rolls are full, or not full, at any given time has nothing to do with whether the purchase of a membership share involves contractual and property interests falling within the protection of 42 U.S.C. §§1981, 1982. However, by relying on this and other irrelevant factors in analyzing this case and *Sullivan*, the court seizes upon wholly invalid grounds for distinguishing the two cases.

3. The court of appeals made the *clearly erroneous* assumption that in order to be eligible for membership in Little Hunting Park one is required to reside in, or own a home in, a prescribed geographic area (App. B, *infra*, p. B-15). The record of the *Sullivan* case shows that out of an authorized membership of 600, 133 members resided in areas outside of those named in the by-laws (Sup. Ct. App. 163-164). At least 25 of the 133 nonresident members lived outside of the prescribed area at the time they acquired membership, and there is no evidence that at the time of acquiring membership any of them owned property in that area (Sup. Ct. App. 221).[14]

[14] Contrary to the court of appeals' supposition (App. B, *infra*, p. B-15, n. 17), the Little Hunting Park eligibility area was extended several times to include areas in addition to the four subdivisions specified in the by-laws (Sup. Ct. App. 219-220). Further, there is no basis for the court's the "leap to suppose" (App. B, *infra*, p. B-15, n. 17) that

(continued)

4. The court of appeals made the *clearly erroneous* assumption that Wheaton-Haven has a greater degree of "exclusivity" than Little Hunting Park, because of the fact that in Wheaton-Haven's 11-year history one white person was rejected for membership by the board of directors (App. B, *infra*, p. B-21). The court completely ignores the fact from the *Sullivan* record, which was brought to its attention, that in the 12 years of Little Hunting Park's existence its board of directors also *rejected one white applicant for membership* (Sup. Ct. App. 127).

The court compounded this error by going *dehors* the record to rely on the unsupported claim of defendants' counsel made at oral argument that "numerous" other unidentified white prospective members were informally rejected for membership by being denied an application form (App. B, *infra*, p. B-21, n. 23). This claim conflicts with defendants' sworn answer to plaintiffs' interrogatory No. 17, which indicates that no one other than Dr. Press was ever denied an application form. The court's uncritical acceptance of the unsubstantiated claim of counsel concerning an important element in the case was not only prejudicial to the plaintiffs but constitutes a marked departure from normal appellate court practice.

## CONCLUSION

There seldom are two cases more alike factually than this case and *Sullivan v. Little Hunting Park*. The court of appeals' refusal to bound by that recent precedent

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14 (continued) such additional areas were opened by the same developers who had opened the original four. The sub-divisions surrounding Little Hunting Park were built long before the recreation association was organized, and builders had nothing to do with its formation (Sup. Ct. App. 24-36, 45).

constitutes a serious breach of the principle of *stare decisi*, a cornerstone of our legal system. The court's action should not be allowed to stand uncorrected. Accordingly, the petition for a writ of certiorari should be granted.[15]

Respectfully submitted,

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March 1972.

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[15] In view of the holding of the *Sullivan* case that a community recreation association such as Wheaton-Haven lacks a "plan or purpose of exclusiveness" – the principal characteristic of a private club – it is apparent that Wheaton-Haven does not fall within the "private club" exemption contained in the Civil Rights Act of 1964 (42 U.S.C. §2000a(e)). Hence, since Wheaton-Haven has the necessary link to interstate commerce (*supra*, p. 4), the racial discrimination practiced here is violative of the 1964 Act.

The court of appeals, in its discussion of the 1964 Act and the Civil Rights Act of 1866, erroneously found that inclusion of the private club exemption in the 1964 Act serves to carve out a

(continued)

15 (continued) similar exemption in the 1866 Act. This holding, as the dissenters noted, is of doubtful pertinency, and in any event, is in direct conflict with established authority. The court's circumscription of the 1866 Act by reliance on the more restricted 1964 Act is contrary to the express holding in *Sullivan*, where this Court stated (396 U.S. at 237):

> We noted in *Jones v. Mayer Co.*, that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of §1982. 392 U.S. at 413-417. What we said there is adequate to dispose of the suggestion that the Public Accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in §1982.

## APPENDIX A

The relevant provisions of the Civil Rights Act of 1866, as incorporated in 42 U.S.C. Secs. 1981, 1982, are as follows:

> Sec. 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *.
>
> Sec. 1982. All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The relevant provisions of Title II of the Civil Rights Act of 1946 (42 U.S.C. Sec. 2000a) are as follows:

> Sec. 201(a) (42 U.S.C. Sec. 2000a(a)). All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> Sec. 201(b) (42 U.S.C. Sec. 2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce * * *:
>
> * * *

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; * * *

* * *

Sec. 201(c) (42 U.S.C. Sec. 2000a(c)). The operations of an establishment affect commerce within the meaning of this title if * * * (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; * * *

* * *

Sec. 201(e) (42 U.S.C. Sec. 2000a(e)). The provisions of this title shall not apply to a private club or other establishment not in fact open to the public * * *

* * *

## APPENDIX B

**Murray TILLMAN et al., Appellants,**

**v.**

**WHEATON-HAVEN RECREATION ASSOCIATION, INC., et al., Appellees.**

**No. 14957.**

**United States Court of Appeals, Fourth Circuit.**

**Oct. 27, 1971.**

**Rehearing and Suggestion for Rehearing En Banc Denied Dec. 16, 1971.**

* * * * *

Allison W. Brown, Jr., Washington, D.C. (Raymond W. Russell, Rockville, Md., on the brief), for appellants.

Henry J. Noyes, Rockville, Md., and H. Thomas Howell, Baltimore, Md. (John H. Mudd, Baltimore, Md., on the brief), for appellees.

Philip J. Tierney, Asst. County Atty., for Montgomery County, Maryland (David L. Cahoon, County Atty., Alfred H. Carter, Deputy County Atty., and Stanley D. Abrams, Asst. County Atty., for Montgomery County, Md., on the brief), for Montgomery County, Maryland, amici curiae.

Before HAYNSWORTH, Chief Judge, and BOREMAN and BUTZNER, Circuit Judges.

HAYNSWORTH, Chief Judge:

The question is whether the Wheaton-Haven Recreation Association, a non-profit group operating a member-owned swimming pool, is required to admit persons as members or guests without regard to race. We find neither the

Civil Rights Act of 1866 (42 U.S.C.A. §§1981 & 1982) nor the Civil Rights Act of 1964 (42 U.S.C. §2000a et seq.) applicable to this association and affirm the order of the District Court granting summary judgment for the defendants.

The pertinent facts are not in dispute, and, as stated by the District Court, are as follows:

Wheaton-Haven was organized in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland. The pool was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a $375 initiation fee and annual dues of $50–$60. Under the by-laws, membership is open to "bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool." Members may be taken from anywhere outside the three-quarter mile radius upon the recommendation of a member as long as members from outside the area do not exceed thirty per cent of the total membership. In either event, applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose."

Membership, which is by family units rather than by individuals, was limited to 325 families, but that limit has never been reached.[1] In practical application, membership is not limited to the geographic area. If a member

[1] Membership figures are not in the record. However, counsel for the defendants stated in oral argument that membership has been held at approximately 260 families for several years.

who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors.

Only members and their guests are admitted to the pool. Members of the general public cannot gain admittance by payment of an entrance fee.

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of Wheaton-Haven. In 1968 Dr. Press sought to obtain an application for membership from members of the Board of Directors, who declined to furnish him with an application. The stipulated reason for their refusal was his race.

Mr. and Mrs. Murray Tillman are members of Wheaton-Haven. The Tillmans brought Mrs. Grace Rosner, a Negro, to the pool as their guest. She was admitted. Within a few days, Wheaton-Haven promulgated a rule limiting guests to relatives of members. Mrs. Rosner has been refused admission as a guest of the Tillmans since then. Her admission on the first occasion was at least partially responsible for the adoption of the guest limitation rule, although it was also intended to reduce the burgeoning number of guests using the pool.

The pool was constructed by a Virginia building contractor. The pool's operation involves the use of machinery manufactured outside Maryland. Snack vending machines are located in the pool area. All of the facilities are in an enclosed area accessible only to members and their guests.

Construction of the pool was done pursuant to a special exception under the zoning ordinances of Montgomery County, Maryland granted by the Montgomery County Board of Appeals. A special exception is unlike a variance; its grant is required whenever an applicant demonstrates compliance with certain conditions. Wheaton-Haven was required to demonstrate its financial responsibility by submitting evidence that 60 per cent of its projected construction costs were obligated or subscribed.

Wheaton-Haven pays state and local real property taxes but is exempt from state and federal income taxes under Md. Code Ann., Art. 81, §288(d)(8) and 26 U.S.C.A. §501(c)(7).

The plaintiffs contend that Wheaton-Haven's discriminatory denial of membership to Dr. Press violates 42 U.S.C.A. §§1981 and 1982[2] on the ground that membership is a species of personal property or a form of leasehold interest in real property, the right to purchase which may not be denied him by any person on the ground of his race. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189. Alternatively, admission to membership is said to be a contract between the association and the member, and the right to make such a contract may not be denied him by the association because he is a Negro. Mrs. Rosner is said to have an

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[2] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *." 42 U.S.C.A. §1981.

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C.A. §1982.

enforceable interest in the Tillmans' membership contract as a third party beneficiary, or, if their membership be considered as a leasehold, she has an enforceable easement of ingress and egress.

The plaintiffs further argue that Wheaton-Haven is a "covered establishment" under the Civil Rights Act of 1964 (42 U.S.C.A. §2000a) as a place of entertainment affecting commerce, and that it does not qualify for the "private club" exemption from the Act's requirement of non-discrimination because, as a matter of law, it is not private under the principles of Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386.

I

In arguing that Wheaton-Haven's racial limitation on membership is forbidden by the 1866 Civil Rights Act, the plaintiffs perforce seek the application of the interpretation placed upon §1982 in Jones v. Alfred H. Mayer Co., supra. Their reliance on *Jones* is misplaced, for in that case the Supreme Court had to consider only the Act of 1866. It was not faced with the question whether a specific provision of a subsequently enacted statute may have limited its effect.[3] This appeal does present that question. If §§1981 and 1982 may be said to cover the admission of members or guests to a recreational facility, and to forbid racial discrimination in their selection, it is beyond question that the same conduct is covered by the Act of 1964.

However, the Act of 1964 contains an express proviso that in certain limited cases, involving the admissions

[3] The Open Housing Act of 1968, which was not in effect at the time of the *Jones* decision, would have expressly prohibited the discriminatory action involved in that case.

policies of "a private club or other establishment not in fact open to the public,"[4] racial discrimination is not forbidden. This exception to the ban on racial discrimination of necessity operates as an exception to the Act of 1866, in any case where that Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act.[5]

[4] 42 U.S.C.A. §2000a(e).

[5] We do not suggest that a practice formerly forbidden by §§1981 and 1982 has, by implication, been repealed by the failure of §2000a, later enacted, also to prohibit it. Repeal by implication is not favored in statutory construction. *Jones v. Alfred H. Mayer Co.*, *supra*, n. 20 at 416, 88 S.Ct. 2186; *United States v. Borden Co.*, 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181. We have here not the mere failure in a later statute to include a prohibition contained in an earlier one covering the same subject matter; rather, to the earlier general statute, which might arguably prohibit the defendant's conduct, is added a later one which expressly protects it, if the defendant is in fact a private club.

Nor can it be argued that the exemption contained in the 1964 Act merely exempted private clubs from its remedial portions, while leaving exempted organizations subject to substantive prohibitions contained in the 1866 Act. Although later interpretations of §§1981 and 1982 have rendered its assumption dubious, it is unquestionable that in 1964 Congress acted in the belief that in outlawing discrimination in public accommodations, it was writing on a clean slate. The Senate report notes that the one previous congressional enactment of a sweeping public accommodations law had been declared unconstitutional by the Supreme Court in 1883, and much of the report was devoted to a discussion in support of congressional authority to prohibit discrimination. S.Rep. No. 872, 1964 U.S.Code Cong. & Admin. News, pp. 2355, 2366. The Act generated an almost unparalleled amount of debate in Congress and in the nation at large, and its exceptions were subjected to particular scrutiny. "Mrs. Murphy's roominghouse" came into the language as a generic classification during the debates. The remarks of both proponents and opponents of the Act make it clear that it was intended to outlaw racial discrimination in the furnishing of certain kinds of goods and

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Consequently, §§1981 and 1982 are unavailable to the plaintiffs as a separate and independent basis for relief. If Wheaton-Haven is a private club as defined in the 1964 Act, the exemption contained in that Act is equally applicable to the earlier statutes.

II

Since the decision in Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386, the analysis of an organization's claim to exemption from federal requirements of non-discrimination has acquired a double aspect. The threshold question is whether the organization is one which satisfies the traditional tests of privacy. See Daniel v. Paul, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318, NeSmith v. Y.M.C.A. of Raleigh, North Carolina, 4 Cir., 397 F.2d 96, United States v. Richberg, 5 Cir., 398 F.2d 523. *Sullivan* introduced an additional consideration, however. To qualify for the exemption an

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[5] (continued) services, except in the case of a few types of very small businesses and private organizations, to which no prohibition against discrimination was to extend. See remarks of Sen. Humphrey and Sen. Long, 110 Cong.Rec. 13697. Congressmen both favoring and opposing the enactment of a public accommodations law attacked the Act as written for making distinctions between permitted and prohibited discrimination. See H.Rep.No. 914, Additional Majority Views of Rep. Kastenmeier, 1964 U.S.Code Cong. & Admin.News, pp. 2391, 2409; Separate Minority Views of Reps. Poff and Cramer, Id., p. 2462. The majority, however, justified the exemption for private clubs as an appropriate recognition of rights of privacy and associational preferences in cases "where freedom of association might logically come into play * * *." Additional [Majority] Views on H.R. 7152 of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell, Id., p. 2487 at p. 2495.

organization must not only be private internally; it must, in addition, be not so intimately related to an establishment or transaction in which non-discrimination is required that it can be said to be a part of, or its membership an incident to, the larger, basically commercial, establishment or transaction. If such a relationship exists, the organization, no matter how internally private it may be, will be subjected to any requirement of non-discrimination that may be applicable to the other.[6] Because *Sullivan* involved an organization similar in many respects to Wheaton-Haven, the plaintiffs strongly urge that the case requires that, as a matter of law, Wheaton-Haven be declared not to be a private club. This argument, we think, ignores certain fundamental differences between the two organizations and fails to appreciate the significance of the Supreme Court's holding in *Sullivan*.

Little Hunting Park is a Virginia non-stock corporation which operates recreational facilities. Its membership was limited to persons who resided in or owned property in the Bucknell Manor, Beacon Manor, White Oaks and Bucknell Heights residential subdivisions in Fairfax County, Virginia.[7] The number of membership shares which any

[6] This rule is perhaps foreshadowed by the qualification to the exemption of private clubs contained in §2000a. A club, though private, is not exempt "to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) [defining covered places of public accommodations] of this section." 42 U.S.C.A. §2000a(e). Thus, a private club which, for example, opened its doors to patrons of a particular hotel would be required to admit all such patrons without regard to race, even though it might still be able to adopt a racial admissions policy with respect to others.

[7] The Board of Directors was authorized to designate other specific areas from which members might be drawn. In addition, a person might retain his membership after moving away from the designated subdivisions.

person might own was limited only by the number of lots he owned in the named subdivisions.[8] Paul Sullivan owned a house in the designated area and, in consequence, owned a membership share in Little Hunting Park. Later he bought a second house in the area, into which he moved, while retaining ownership of the first. This entitled him to purchase a second membership share, which he did. After moving, Sullivan leased his old house to T. R. Freeman, Jr., a Negro. With the lease of the home he made a temporary assignment of his second membership share to Freeman, as provided in the by-laws. However, the Board of Directors refused to accept the assignment because of Freeman's race. Subsequent difficulties over the assignment resulted in Sullivan's expulsion from Little Hunting Park. On his own behalf and Freeman's, he then sued for reinstatement and to compel approval of the assignment.

The state trial court declined to scrutinize the reasons for Sullivan's expulsion because it regarded Little Hunting Park as a "private and social" club, and denied relief. The Supreme Court of Appeals of Virginia denied a writ of error. The Supreme Court reversed, holding that 42 U.S.C.A. §1982, which it had held in Jones v. Alfred H. Mayer Co., supra, to forbid all private racial discrimination in the sale or lease

[8] Although it is not expressly stated, it is inferable from Little Hunting Park's organization and membership provisions that it was built by the same real estate developers who built the four subdivisions from which members were drawn, as an aid to the sale of homes. This has become a common practice in the development of residential subdivisions. See *Jones v. Alfred H. Mayer Co., supra,* where the opinion of the Court of Appeals discloses that the defendants, developers of the Paddock Woods subdivision in which Jones sought to buy a home, had also formed the Paddock Country Club, a golf and tennis club intended for the use of the persons to whom they sold homes in the subdivision. 8 Cir., 379 F.2d 33, 35.

of real and personal property, applied to Sullivan's transfer to Freeman of the membership share as a part of the lease of his home.[9] It further held that the Board of Directors was forbidden to frustrate the transfer on racial grounds, and that a remedy was available to the aggrieved parties.

*Sullivan* thus decided affirmatively a question expressly reserved in *Jones* – whether an incident to a transaction in which the parties are protected from racial discrimination by §1982 is similarly protected.[10] However, it has no application to a transaction which is itself not within the protection of §1982 and is not a part of or an incident to such a transaction. Whether *Sullivan* outlaws any or all racial discrimination in Wheaton-Haven's membership and guest policies is to be determined not by the association's formal organization but by whether it is in fact an organization in which the acquisition of membership is an incident of a protected sale or lease of property.[11]

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[9] "There has never been any doubt but that Freeman paid part of his $129 monthly rental for the assignment of the membership share in Little Hunting Park. The transaction clearly fell within the 'lease.' * * * Respondents' actions in refusing to approve the assignment of the membership share in this case was clearly an interference with Freeman's right to 'lease.'" *Sullivan v. Little Hunting Park, supra*, at 236-237, 90 S.Ct. at 404.

[10] See *Jones v. Alfred H. Mayer Co., supra*, n. 10 at 413-414, 88 S.Ct. 2186. *Sullivan* did not purport to decide the question with respect to some of the other "incidents" discussed in *Jones*, and the question may become moot now that the Open Housing Act of 1968 is in full effect.

[11] We need not consider any of the transactions covered by §1981 at this juncture. Manifestly, admission to membership in Wheaton-Haven is not incident to any contract other than the membership agreement itself, if it is not incident to a contract for the sale or lease of property.

Initially, it should be observed that the sort of transaction out of which the dispute in *Sullivan* arose, under no circumstances, could have arisen with respect to Wheaton-Haven. Unlike Little Hunting Park, Wheaton-Haven does not allow one person to own multiple memberships. Membership is by family units. An eligible family may have one membership, which entitles only family members and guests (relatives only, under its current rules) to use the pool. Thus a member of Wheaton-Haven cannot engage in the "business" of renting out his right to use Wheaton-Haven's facilities, as Sullivan did with his second share. Even if a member desired to rent his one membership share, giving up the right to use the pool himself, there is no way in which it can be done under the regulations of the association, for membership is, quite simply, nonnegotiable. [12]

That a membership cannot be leased does not, of course, end the inquiry. If it is transferred as an incident to a sale of property, the membership would be subject to the same requirement of non-discrimination that §1982 imposes on the major transaction. On this point the plaintiffs place their principal reliance. Under the by-laws, if a member of Wheaton-Haven who is a property-owner sells his home

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[12] There is a provision in the by-laws which allows members who cannot use the pool to become inactive, in which event a number of "temporary memberships" not greater than the number of inactive memberships is authorized. However, temporary memberships are authorized to be offered to waiting applicants for full membership, and only in the order in which they appear on the waiting list. Thus, it is impossible for a member to become inactive in order to give another selected person temporary access to the pool. He has no control over the selection of the persons who will be offered a temporary membership, for it automatically goes to the first person on the waiting list. Additionally, the temporary membership provisions is effective only when the rolls are full, and this condition has never existed at Wheaton-Haven.

and resigns his membership,[13] his purchaser is entitled to a first option to become a member. The plaintiffs urge that this is merely a devious method of accomplishing the same result as was accomplished by direct transfer in *Sullivan*. Under other circumstances we might agree, but in this case we cannot. In the context of this case, the overall operations of Wheaton-Haven, and the positions of the parties, the option provision is so speculative and remote that it cannot be a realistic basis for a determination that there is a transfer of membership in Wheaton-Haven incident to a transaction in real or personal property.

A first option is not the equivalent of acceptance for membership, although in other circumstances it could be. The holder of a first option receives the right to have his application for membership considered without taking his place at the end of the waiting list. No other rights attach to the option. Because the effect of the option is solely to vault a resigning member's vendee over the heads of persons on the waiting list to receive immediate consideration for a newly vacated membership, it can operate only when the membership rolls are full, and a waiting list exists. Absent a full membership list, the new homeowner receives literally nothing, for his "option" entitles him only to what every other prospective member is entitled to – the right to be considered immediately for membership in an organization which has room for all present applicants. The value of a first option to acquire something which is immediately available in sufficient quantity to supply all who want it is nothing.

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[13] A member is not required to resign in the event he sells his home. If he retains his membership, of course, no option is given to his purchaser.

Wheaton-Haven's membership rolls are not full and have never been. There are some sixty vacancies out of the authorized membership of 325, a situation which has obtained for several years. Thus, any eligible person, with or without an option, can have an application for membership considered without the necessity of working his way up through a waiting list. The first option, from the founding of Wheaton-Haven through the foreseeable future, is a thing utterly without use or value and, as such, is a functional nullity. It is far too tenuous a thread to support a conclusion that there is a transfer of membership incident to the purchase of property.[14] Significantly, the plaintiffs have never suggested that any person ever became a member of Wheaton-Haven in this manner, in sharp and marked contrast to the situation in *Sullivan*, where transfers and assignments incident to land sales were expressly provided for and appear to have occurred as a routine matter.

Finally,[15] plaintiffs argue that *Sullivan* controls this case because Wheaton-Haven draws members from an area so

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[14] It is difficult to understand how the argument on this point would benefit the plaintiffs in any event. The person from whom Dr. Press purchased his home was not a member of Wheaton-Haven, and Dr. Press acquired nothing connected with Wheaton-Haven by his purchase. Were the situation presented where a Negro had purchased a home from a resigning member and been refused consideration for membership, we might have a different case. Here there is no transaction on the basis of which Dr. Press could have acquired a specific right which, were he white, would have carried with it some embryonic interest in Wheaton-Haven.

[15] The plaintiffs make one additional argument which is not strenuously urged. It is suggested that *Sullivan* holds that any organization which either makes use of land, so that a member might be said to

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geographically delimited that the purchase of a home in the area impliedly carries with it the right to membership in the pool. This argument is of much broader scope than the argument based on the first option provision. If correct, it means much more than that some individual memberships in Wheaton-Haven may be incident to sales of property, and, as such, subject to the purchaser's right to enjoy membership as incidental to them without interference by the other members. It would mean that the whole of Wheaton-Haven is an incident to home ownership in the area, as was the situation with the Paddock Country Club in Jones v. Alfred H. Mayer Co., supra. From this it would follow that any person purchasing a home in the designated area would have a right to be considered for membership without regard to race.

The argument, however, mischaracterizes both Wheaton-Haven and Little Hunting Park in an attempt to make them appear functionally identical. The sources of members for the two organizations are markedly different. Although *Sullivan* did not expressly hold that Little Hunting Park would be required to admit any eligible person

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[15] (continued) lease the property on which it carries out its functions, or which enters into contracts with its members, is not private. This argument turns *Sullivan* on its head. It is the fact of membership being incidental to the purchase or lease of property (or perhaps to the making of some other contract) which, *Sullivan* holds, brings a club, perhaps otherwise private, within the ambit of §1982 so as to protect the purchaser or lessee in his right to enjoy the membership incident to the property interest which he purchased or leased. That a club must use land in order to carry out its functions, or that it makes a "contract" of membership with everyone who joins, is irrelevant to the problem with which *Sullivan* dealt.

to membership without racial discrimination, it is reasonably inferable from the opinion, and we will assume here that a general requirement of non-discrimination in member selection is imposed by *Sullivan* on any organization which stands in the same relationship to the area from which it draws members as does Little Hunting Park to the area it serves.

Little Hunting Park drew members only from four named residential subdivisions. Some confusion is created by the fact, pointed out by the plaintiffs, that some of its members resided elsewhere. However, it should be noted that one need not reside in the named subdivisions in order to purchase a membership share in Little Hunting Park. One need only own property there.[16] In addition, it was possible for a person who had acquired membership through residence or ownership in one of the subdivisions to retain it after he moved away. These factors easily explain why Little Hunting Park had non-resident members. Membership was unequivocally tied to the land, whether one resided there or owned it.[17]

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[16] It is precisely this feature of Little Hunting Park that renders it most suspect as an incident to sales in a commercially developed subdivision rather than a truly voluntary association. It encouraged the development of absentee landlords dealing commercially in membership shares, a situation which is impossible at Wheaton-Haven.

[17] The Board of Directors of Little Hunting Park was authorized to designate additional areas as sources of members, but counsel for plaintiffs, who represented the successful plaintiffs in *Sullivan* and has supplemented the record with a great deal of background information about that case and about Little Hunting Park in particular, has not suggested that any additional areas were so designated. It does not require a great leap to suppose that if an additional area should be named by the directors, it would undoubtedly be another subdivision opened by the same developers who had opened the original four.

Wheaton-Haven accepts as members persons who actually reside within an area described by a circle three quarters of a mile in radius with its center at the pool. On the recommendation of a member, and subject to a limit of thirty percent of the total membership, it will accept persons as members who live anywhere outside the three quarter mile circle.

Fundamental differences are at once apparent. Little Hunting Park appears to be characteristic of the sort of recreational facilities frequently installed in modern real estate developments, which are included by the developers to enhance their sales of individual properties, and which are "private" in the sense that they serve only those persons who purchase from the developers. The right to use the recreational facilities is incidental to, or part of, the rights acquired directly with the acquisition of possessory rights in a lot in one of the designated subdivisions.

The contrary is suggested by Wheaton-Haven's organization and structure, and confirmed by its history. Its benefits are not limited to those who deal commercially with a particular developer or group of them, and its members are not limited to, nor does it purport to serve all of, the "general public" in any recognizable community. There is an area preference, and nothing more, in the provision that not more than thirty per cent of the memberships may be awarded to persons who reside more than three quarters of a mile from the pool.

The difference between a real estate developer who builds recreational facilities, the use of which he restricts to those persons who purchase his home-sites, and a voluntarily associated group of neighborhood residents who, desiring to build one, and who, desiring that most of their

group should be reasonably near neighbors, set up a proportional preference for persons living near the facility, is one which goes to the very heart of the difference between public and private. The history of Wheaton-Haven's formation and development, noted briefly above, demonstrates that it is just such a voluntary and spontaneous organization. The District Court correctly found *Sullivan* inapplicable to such an organization.

## III

There remains the question whether Wheaton-Haven is a "private club or other establishment not in fact open to the public." Although the preceding discussion may suggest the answer, the point requires separate consideration, as there are additional factors which must be taken into account in order to make a full determination of the claim for exemption under the specific terms of the 1964 Act.

The cases under 42 U.S.C.A. §2000a(e) are now so numerous, and the standards applicable in determining a claim for exemption so often discussed, that it would serve no purpose to list those standards.[18] Considered in their light, Wheaton-Haven qualifies under the Act as a private club.

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[18] *See, e.g., Daniel v. Paul,* 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318; *NeSmith v. Y.M.C.A. of Raleigh, North Carolina,* 4 Cir., 397 F.2d 96; *U. S. v. Richberg,* 5 Cir., 398 F.2d 523; *Stout v. Y.M.C.A. of Bessemer, Alabama,* 5 Cir., 404 F.2d 687; *Wesley v. City of Savannah,* S.D.Ga., 294 F.Supp. 698; *U.S. by Katzenbach v. Jack Sabin's Private Club,* E.D.La., 265 F.Supp. 90; *Williams v. Rescue Fire Co.,* D.Md., 254 F.Supp. 556.

Certain of its features are obvious indicators of its private nature. Its structure is that of a private association, though that is not of great weight, since it is relatively easy for a place of public accommodation to take on the formal features of a club without changing its nature. Unlike every organization which has ever been held to be a "sham" private club, Wheaton-Haven is owned, operated and controlled entirely by its membership. It was initially financed through the initiation fees of the first members, and new members must make a comparatively heavy investment of $375 in order to join. The members of the Board of Directors are required to be club members. Regular membership meetings are held, and members participation is strikingly high.[19] Substantial annual dues are charged, and members are liable for further assessments if the dues are insufficient to meet annual expenses. Only members and their guests can use the pool. There is no way in which a non-member, by payment of an admission fee, can gain entrance. Nor does Wheaton-Haven publicly solicit members.[20]

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[19] The exhibits filed by Montgomery County, which was allowed to participate as *amicus curiae* urging reversal, reveal that at one recent membership meeting there were 106 members present and voting. No figures were supplied for other meetings. The one in question was held at the time the guest limitation was adopted, and may or may not be typical.

[20] The pool engages in no advertising whatever. At the pool area there is a sign giving the telephone number of the membership chairman, but it is not disputed that this sign is so positioned that it can be seen only by the members and their guests who have already been admitted to the area.

Wheaton-Haven does not hold itself out in any way as serving the general public, whether that aggregate be considered from the standpoint of Maryland, Montgomery County, Silver Spring or the three quarter mile circle from which seventy per cent of the members are drawn. The membership limitation is such that even if the "general public" is regarded as including only the residents of the last, most severely delimited area, Wheaton-Haven has deliberately avoided any attempt or claim to serve the group as a whole.[21]

For purposes of federal and state taxation Wheaton-Haven is classified as other private clubs.[22] That it goes by a different name – community swimming pool – for

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[21] Cf. *NeSmith v. Y.M.C.A. of Raleigh, North Carolina, supra,* in which the defendant offered membership to any person in the city of Raleigh, and in fact did have several thousand members.

Population figures are not included in the record. However, it is manifest that in a nearby suburb of Washington, D.C., a residential area including almost two square miles will have a number of residents exceeding by many times the number which Wheaton-Haven was designed to serve.

[22] The County contends that, as a community swimming pool, Wheaton-Haven is favored over private clubs by the state income tax laws. This contention finds no support in Maryland law. Wheaton-Haven's exemption from state income taxes is derived from Md. Code, Art. 81, §288(d) (8), specifically exempting community swimming pools. In the same section, §288(d) (5), religious, educational, charitable, social, fraternal and other similar corporations, a category which, so far as we can determine, includes almost every kind of private club, are granted the identical tax exemption.

zoning purposes is not relevant to our inquiry. The name is without significance. It serves merely to subject the organization to certain requirements relating to set-backs, provision of parking spaces, and financial responsibility because of the obvious capacity of such a facility to become a public nuisance if it is not regulated somewhat more closely than are organizations operating other kinds of facilities. That the state requires it to meet certain neutral conditions relating to health, safety or convenience in order to operate neither makes it a public facility nor involves the state in its membership policies.

The final test, and one of the more important ones, is the test of exclusivity. The test is an elusive one, because in many cases the membership requirements of a genuine private organization, though real, are not susceptible to precise definition. In essence, a private club is a voluntary and generally self-governing association of persons drawn together for the furtherance of a common goal. The common interest in a single activity or project is itself often the principal basis of selectivity, and many clubs require no other. Often the members of a club desire a broader range of commonality of interests than a single common interest, to the end that the members should be socially congenial. Where an organization exhibits no discernible basis of commonality other than a common desire to exclude persons of other races, it becomes difficult, if not impossible, to distinguish it from a place of public accommodation attempting to masquerade as a club. As is the case in any line-drawing exercise, the difficulty here lies in determining the nature of an organization which appears to be somewhere between the obviously public and the obviously private. Generally, the courts have looked for assistance in such cases to the

other distinguishing characteristics, discussed above, which mark an organization as public or private. In those respects Wheaton-Haven appears unmistakably private. Nevertheless, it lacks easily ascertainable standards for membership other than, obviously, an interest in swimming sufficiently great to impel a person to pay the very substantial fees and dues that membership entails.

That standards are not immediately and precisely ascertainable, however, does not mean that they do not exist. Some considerations of social and financial standing are implicit in the size of the fees and dues. There are selective elements other than race alone. Rejection of white applicants is, though rare, not unheard of. The record does not contain the reason for the rejection, but the application of one white man was rejected.[23] The parties did not address themselves to the point, but the County points out that interviews are conducted with prospective members, although it suggests that these interviews are not far-ranging.

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[23] This low rejection rate is in connection with formal applications only. At oral argument we were told by counsel for the defendants that there have been numerous occasions in the past when a white prospective member would be rejected after an informal interview and not given an application for membership. This would not show on the club's records as a rejection, but it would have the same effect. This information is not in the record, but the plaintiffs have not suggested that it is an inaccurate representation. It is typical of the manner in which private clubs often screen prospective members. Very often the actual application for membership is strictly a formality, for the club's decision will have been already made.

Dr. Press, of course, was rejected in exactly this manner. Because he was never allowed to make a formal application for membership, he would not appear on Wheaton-Haven's books as having been rejected, despite the fact that we know he was.

In sum, although Wheaton-Haven's membership admittedly, is racially identifiable, it has been influenced by other criteria. Given the fact that its form of organization, its manner of operation, and its member activities are all characteristic of a bona fide private club rather than a place of public accommodation, and that it clearly meets the only express test set out by Congress – that it be "not in fact open to the public" – we cannot say that its inability to produce a detailed set of clear, precise and unmistakable standards for membership marks it as a covered establishment. From the standpoint of all the relevant factors taken as a whole, it has demonstrated that it is private, within the meaning of the federal statute.

A brief comment is in order concerning the participation in the case of Montgomery County. The County has enacted an anti-discrimination ordinance, which it has sought to have applied to Wheaton-Haven.[24] It sought leave to participate in the case in the belief that a decision favorable to Wheaton-Haven would preclude any effort on its part to have the local ordinance applied to it and similar organizations. The assumption, of course, is quite erroneous. Our decision here has no effect on state or local laws or their interpretation by state courts. The federal statute is unlike the county ordinance, and it is for the courts of Maryland alone to determine what objects the local law includes. Nor is there any pre-emptive

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[24] Because the ordinance was enacted in executive rather than legislative session, a question has been raised as to its validity under the Maryland Constitution. That question, of course, will be finally resolved in the courts of Maryland and does not concern us.

effect on local attempts to eradicate racial discrimination at other levels than those reached by federal law.[25] The contrary is well established by the terms of the Civil Rights Act, 42 U.S.C.A. §2000a-6(b), and by previous decisions of the Supreme Court. *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84.

Affirmed.

BUTZNER, Circuit Judge (dissenting):

I would have granted the plaintiffs' motion for summary reversal because the judgment dismissing their claim is a marked departure from authoritative precedent construing those provisions of the Civil Rights Act of 1866 codified as 42 U.S.C. §1982 (1970).

The bylaws of the Wheaton-Haven Recreation Association, Inc. provide that membership "shall be open" to residents who live within three-quarters of a mile of the pool, subject to a stated maximum number of families and to approval of the association acting through its members or its board of directors. The bylaws also provide for Wheaton-Haven to repurchase the membership of a member who resigns and sells his home. In that event, the purchaser of the home shall have the first option to buy the membership of the seller from Wheaton-Haven, subject to the approval of the board.

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[25] We recognize that, as Mr. Justice Harlan has pointed out, there may be constitutional questions concerning the attempted eradication of some very low levels of private discrimination. *Sullivan v. Little Hunting Park, supra*, dissenting opinion of Harlan, J., at 248, 90 S.Ct. 400.

Dr. and Mrs. Harry C. Press own a home in this neighborhood. It is undisputed that they were disqualified from membership for one reason – they are black. Had they been white persons, they could have purchased a membership in Wheaton-Haven. Membership would have afforded them not only a right to use the pool but, of greater significance to this case, it would have allowed them to sell to the eventual purchaser of their home an option to purchase their membership.

I

The Civil Rights Act of 1866 provides in part:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Court applied the Act to bar racial discrimination in the sale of a house. The Court cautioned that "Negro citizens * * * would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." 392 U.S. at 443, 88 S.Ct. at 2205.

*Jones v. Alfred H. Mayer Co.* establishes beyond doubt that Dr. and Mrs. Press have the same right enjoyed by their white neighbors to purchase, hold, sell, and convey real and personal property. They are entitled to no less. The sole question raised by this case, then, is whether membership in Wheaton-Haven is property within the meaning of §1982. I believe it is.

While the details differ, this case is indistinguishable in all material aspects from *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 386 (1969). Under the bylaws of Little Hunting Park, membership in a swimming pool association was open to residents in an area of Fairfax County, Virginia, and a member could assign his membership to a tenant, subject to the approval of the board of directors. When a white member attempted to assign a membership to his tenant, the board of directors refused approval because the tenant was black. The trial court denied relief to the landlord and tenant on the ground that Little Hunting Park was a private social club. Finding "nothing of the kind," the Supreme Court reversed, saying: "There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race. * * * It is not material whether the membership share be considered realty or personal property, as §1982 covers both." 396 U.S. at 236, 90 S.Ct. at 404. And the Court held that the transaction clearly fell within the right to "lease" protected by §1982. 396 U.S. at 237, 90 S.Ct. 400.

The points of distinction involving the nature of the property right considered in *Sullivan* and the nature of a Wheaton-Haven membership are not of controlling significance.

It is immaterial that a tenant claimed membership in Little Hunting Park under a lease, while Dr. and Mrs. Press base their claim on ownership of real property situated less than three-quarters of a mile from the pool. Section 1982 protects the rights to "purchase" and "hold" property no less than the right to "lease."

Nor does it matter that families who own no real estate can join Wheaton-Haven or that Dr. and Mrs. Press are seeking to acquire membership on the basis of owning a home instead of exercising an option. Under the bylaws membership is "open" to a white neighbor without the exercise of an option. Having obtained a membership, the neighbor can eventually sell an option for it along with his home in accordance with Wheaton-Haven's bylaws. Since membership in Wheaton-Haven is incident to the ownership of property, it is covered by §1982.

Similarly, I cannot accept Wheaton-Haven's argument that because the membership rolls are not presently filled the option has little or no value. Several years from now it may well be that a white neighbor can sell his home at a considerably higher price than Dr. and Mrs. Press because the white owner will be able to assure his purchaser of an option for membership in Wheaton-Haven. Dr. and Mrs. Press, however, are denied this advantage. Even though the present value of an option cannot be readily ascertained, a dollar in the hands of Dr. and Mrs. Press, in the language of *Jones v. Alfred H. Mayer Co.*, should be able to purchase at least the same thing as a dollar in the hands of their white neighbors. Section 1982 should not be construed to deny a bargain on the basis of race.

The vice of Wheaton-Haven's discriminatory practices is similar to Little Hunting Park's. In each case ownership

of real property by a white person carried with it the right to a transferable membership – a right denied to black persons. Little Hunting Park's transfer by assignment and Wheaton-Haven's use of an option differ only in form, not substance. The congressional commitment to equal rights under the law manifested by the enactment of the Civil Rights Act of 1866 cannot be served by viewing this case as a simple exercise in the fine art of conveyancing. The case involves far more. It is an attempt to secure what the proponents of the Act envisioned and the Supreme Court has preserved – the "great fundamental rights" of "all men, whatever their race or color" to "acquire" and "dispose" of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

II

I doubt the pertinency of the claim that the Civil Rights Act of 1866 is circumscribed or limited by the Civil Rights Act of 1964.[1] This is an inappropriate case to consider whether private clubs are excluded from the Civil Rights Act of 1866. The plaintiffs make no claim for admission to a private club. Instead they contend correctly, I believe, that Wheaton-Haven is not a private club.

To maintain its claim of privacy, Wheaton-Haven points to its rejection of one white applicant since 1958, and its counsel in oral argument asserted that other persons had

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[1] Similar arguments have been made and rejected. *E.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-17, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1100 (5th Cir. 1970).

been informally rejected. But the record and counsel's excursion outside it do not establish that any homeowner living within three-quarters of a mile of the pool was denied membership or that any person acquiring an option with his purchase of a house was turned away.[2]

It is difficult to believe that a club is private when its membership is so closely tied to real estate bought and sold on the open market. *Sullivan v. Little Hunting Park* holds that in a similar context the test of a private club is whether there is "a plan or purpose of exclusiveness." 396 U.S. at 236, 90 S.Ct. at 404. Here there is none save race. As far as this record shows, Wheaton-Haven's bylaws mean just what they say: membership is "open" to residents within a specified geographic area and membership can be transferred to the purchaser of a member's house. It is immaterial that membership initially and by transfer is subject to the approval of the corporation either through its members or its board of directors. The bylaws of Little Hunting Park also subjected assignment of membership to approval of the board of directors. But as *Sullivan* teaches, §1982 prohibits the board from withholding approval because of race. 396 U.S. 236.

Wheaton-Haven emphasizes that Little Hunting Park had aspects of commercialism that it lacks. The record before us does not support this conclusion, but even if it did, it would be irrelevant. *Sullivan* did not turn on this point.

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[2] Of course, Wheaton-Haven could refuse membership to any number of persons, black or white, who lived within or without the geographic area designated by its bylaws, without infringing rights secured by §1982 if refusal were not based on race.

The test is not whether the organizers were commercially motivated, but whether there is presently a "plan or purpose of exclusiveness" with respect to membership, 396 U.S. at 236, 90 S.Ct. 400.

III

Mr. and Mrs. Murray Tillman are white members of the association who brought a black guest, Mrs. Grace Rosner to the pool. Her visit provoked a change in the bylaws; guest were limited to relatives of members – all of whom are white. Unquestionably Wheaton-Haven can limit the number of guests a member can bring. Similarly, it can refuse to admit guests, regardless of race, who because of their demeanor or age would unduly burden the use of the pool. But otherwise valid limitations cannot be couched directly or indirectly to restrict the race of guests. The Tillman membership is a valuable property right, an incident of which is the right to invite guests. The right would be empty indeed unless the guests have the right to accept. Racial restrictions on the right to invite guests, and to accept invitations, are racial restrictions on the right to hold property that violate §1982. A white host can vindicate this right. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969). *Cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

I would reverse the judgment, enter summary judgment for the plaintiffs, and remand for further proceedings consistent with this opinion.

ON PETITION FOR REHEARING

PER CURIAM:

In the petition for rehearing the Court's attention was invited to the answer to an interrogatory indicating that the membership list of Wheaton-Haven Recreation Association was full in the spring of 1968 when Dr. Press first became interested in considering a possible application for membership. That answer seems to be contradicted by an answer to another interrogatory reporting the admission of three new members before any intervening resignation, but finds general support in a deposition of a member of Wheaton-Haven's board who championed the cause of the admission of Dr. Press.

The briefs, the appendices, and the findings of the district court all seemed to warrant the statement in the opinion that the membership list had never been full. That inadvertent misstatement is now corrected to reflect a full membership list in the spring of 1968. The result is unaffected, however, for it is clear that the membership did drop off thereafter, that Dr. Press would have been admitted without delay except for the fact that his submission of a formal application was foreclosed by the resolution adopted by the members in the fall of 1968, and that there has been no waiting list since then. The situation with respect to the presence or absence of vacancies in the membership list has relevance only prospectively from the date of that meeting of the membership.

The petition for rehearing and the suggestion for rehearing en banc having been considered, the court having been polled and less than a majority of the panel having voted for a rehearing and less than a majority of the court having voted for a rehearing en banc, the petition for rehearing and the suggestion for rehearing en banc are both denied.

WINTER and CRAVEN, Circuit Judges, dissenting:

We dissent from the denial of rehearing en banc.

For the reasons expressed by Judge Butzner, the dissenting member of the panel which decided the case, we think the instant case is indistinguishable from *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 299, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), and plaintiffs are entitled to judgment on its authority.

Even if our reading of *Little Hunting Park* is erroneous, we deplore the majority's arriving at the dubious holding that the Civil Rights Act of 1866 was impliedly repealed in part by the Civil Rights Act of 1964 when that question has been neither briefed nor argued. A holding of that importance and scope – and one apparently in conflict with the decisions of other courts that have considered the question – should be reached if not by the court sitting en banc, then at least by the panel hearing the case, only after full adversary treatment by the parties.

## APPENDIX C

[Filed July 8, 1970]

Allison W. Brown, Jr., Washington, D.C., and Raymond W. Russell, Rockville, Maryland, for plaintiffs.

Henry J. Noyes, of Rockville, Maryland, for all defendants except Richard E. McIntyre.

John H. Mudd and H. Thomas Howell, both of Baltimore, Maryland, for defendant Richard E. McIntyre.

Northrop, District Judge.

This is an action by a Negro homeowner to obtain membership in a private swimming pool and by a white member of the pool and that white member's Negro guest to have the community pool's policy of not permitting Negro guests declared a violation of the laws or Constitution of the United States. The Wheaton-Haven Recreation Association, Inc., a non-profit Maryland corporation which owns and operates the pool, and individuals who are directors of the corporation are the defendants. The defendants have filed a motion for judgment on the pleadings which the court under rule 12c will treat as a motion for summary judgment and the plaintiffs have filed a motion for summary judgment. There is no dispute as to the facts which are admitted in the pleadings or stipulated.

Wheaton-Haven Recreation Association was set up in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland. The pool, constructed in the 1958-59 season, was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a $375 initiation fee and annual

dues of $50-$60. As set out in the bylaws of the corporation, membership is open to "bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool." Defendants' exhibit 1 to complaint (Bylaws art. III, sec. 1). Members may be taken from outside the three-quarter mile radius upon the recommendation of a member as long as the percentage of members from outside the area does not exceed 30 percent. In either event, applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose." Defendants' exhibit 1 (Bylaws art III, sec. 3). Membership, which is by family units rather than simply individually, was limited to 325 family units, but at no relevant time has the membership been filled, so that in effect membership is not limited to the geographic area. In the event a member sells his property, the purchaser has an option to purchase the seller's membership in the pool; but the procedure set out is for the seller to resign and the buyer to apply for membership, the application being subject to the approval of the Board of Directors. Defendants' exhibit 1 to complaint (Bylaws art. VI). Negro families do reside within the three-quarter mile area; and, while none of those families are members of the pool, there is no indication that any of them, other than the plaintiff Press, has applied for membership. Wheaton-Haven records reveal that, prior to the application involved herein, only one application, that of a white man, has been rejected by the association in its eleven-year history.

Only members and their guests are admitted to the pool. Unlike the situation common in other cases involving swimming pools or recreation areas, the public is not admitted

to the Wheaton-Haven facility upon the payment of an entrance fee, frequently denominated in those other cases as a "membership fee."

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and, therefore, had no interest in the pool which he could transfer. In the spring of 1968, however, Dr. Press sought to obtain an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with an application. The stipulated reason for not sending him an application was that Dr. Press is a Negro.

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. Around July 19, 1968, the Tillmans brought Mrs. Grace Rosner, a Negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members. On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans to bring Mrs. Rosner to the pool as a guest. The limitation on guests, while perhaps precipitated by the admission of Mrs. Rosner on July 19, was intended to keep down the burgeoning number of guests.

The Wheaton-Haven pool was constructed in 1958-59 by Gillespie & Co., a Falls Church, Virginia, contractor. Present operations of the pool entail the use of pumps, a motor, and a chlorine feeder manufactured outside the State of Maryland and snack vending machines. All these facilities are in an enclosed area available only to members and their guests.

Construction of the pool facility was done pursuant to a "special exception" under the zoning ordinance of the

Montgomery County (Maryland) Code granted by the Montgomery County Board of Appeals. Under Maryland law, a "special exception" is a use permitted if certain prerequisites detailed by the legislative body are met; thus granting such an "exception" is not a discretionary act by the zoning board and a "special exception" is to be distinguished from a "variance." *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 262 A.2d 499 (1970); *Montgomery County v. Merlands Club, Inc.*, 202 Md. 279, 96 A.2d 261 (1953); Carson, Reclassifications, Variances, and Special Exceptions in Maryland, 21 Md. L. Rev. 306, 314-15 (1961). For example, prior to granting a special exception, the zoning authority required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed.

Wheaton-Haven does pay state and local real estate taxes, but is exempt from state and federal income taxes under section 288(d)(8) of article 81 of the Maryland Code and section 501(c)(7) of the Internal Revenue Code exempting non-profit, member-owned and controlled recreational facilities.

## PLAINTIFF'S CONTENTIONS

Plaintiffs claim that defendants' racially discriminatory conduct violates their rights under 42 U.S.C. sections 1981, 1982, and 2000. The relevant portions of 42 U.S.C. sections 1981 and 1982 are as follows:

> Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

> Section 1982. All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Plaintiffs claim that Dr. Press sought either to enter into a contract for the purchase of a pool membership or to purchase personal property, namely a pool membership, under circumstances in which white citizens could obtain such membership, but that Dr. Press was, contrary to section 1981 or 1982, denied that opportunity solely because of his race. Plaintiffs claim that the Tillmans' membership in the pool is either a contract or property interest and that, under *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969), they may sue under section 1982 for racially discriminatory conduct which is directed towards them for their associations with those of the black race and which interferes with their contract or property right. Finally, plaintiffs claim that Mrs. Rosner is either the third-party beneficiary of the Tillman's contract with Wheaton-Haven or the owner of a license or implied easement of ingress and egress and that the pool's racially restrictive guest policy denies Mrs. Rosner's right to acquire and enjoy those interests. They rely upon *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), and *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970).

Under 42 U.S.C. section 2000a, a person is entitled to be free of racial discrimination in the use and enjoyment of "any place of public accommodation," defined to include any "place of entertainment" in subsection (b), as long as either state action or an effect on interstate commerce is involved. Plaintiffs claim that, under *Daniel v. Paul*, 395 U.S. 298 (1969), a "place of entertainment"

includes a recreational area in which the patron is an active participant and not merely a passive spectator, and that the construction of the pool in Maryland by a Virginia contractor and the presence on the premises of equipment necessary for the functioning of the pool and manufactured outside Maryland establish the effect on commerce.

## 42 U.S.C. SECTION 2000a AS A BASIS FOR RELIEF

Under 42 U.S.C. Section 2000a(e), a "private club" is exempt from the provisions of 42 U.S.C. Section 2000a and, therefore, may discriminate on the basis of race. That subsection provides as follows:

> The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

Therefore, if Wheaton-Haven is in fact a private club, then its admitted discrimination against the Presses and Mrs. Rosner is not a violation of 42 U.S.C. Section 2000a.

The undisputed facts show that Wheaton-Haven is a member-owned and controlled, non-profits recreational facility. Its membership is not confined to a particular geographic area. Membership applications are subject to the approval of the Board of Directors or to the approval of the membership itself. The discretion to reject application has, one on previous occasion, been exercised to exclude a white applicant. Members pay a substantial membership fee of $375 and yearly dues of $50 to $60. Membership is limited to 325 family units.

In *Nesmith v. Young Men's Christian Ass'n*, 397 F.2d 96, 101-02 (4th Cir. 1968), the Fourth Circuit indicated the following:

> In determining whether an establishment is in fact a private club, there is no single test. A number of variables must be examined in the light of the Act's clear purpose of protecting only "the genuine privacy of private clubs . . . whose membership is genuinely selective . . . ." . . . The first factor is the size of the organization and the open-ended character of its membership rolls. Most private clubs have limited membership . . . and easily articulated general admission standards. . . . As one commentator observed, "Where there is a large membership or a policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective . . . ."
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> * * *
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> . . . "[S]erving or offering to serve all the members of the white population within a defined geographical area is certainly inconsistent with the nature of a truly private club."

In *Daniel v. Paul*, 395 U.S. 298, 301 (1969), the Supreme Court concurred in the lower courts' conclusion that a recreation area operated for profit and lacking "the attributes of self-government and member-ownership traditionally associated with private clubs" was not a private club within the meaning of 42 U.S.C. Section 2000a(e). Similarly, where membership in a swimming pool "club" cost twnty-five cents for admission, virtually no applicants

for membership other than the Negro plaintiff had been denied membership, and the membership did not participate in club decisions, this court concluded that the "club" operation was "an obvious subterfuge." *Williams v. Rescue Fire Co.*, 254 F. Supp. 556, 563 (Northrop, J.) (D. Md. 1966). The fact that the membership had no practicable way to change the racially discriminatory policies of Kenwood Golf and Country Club was an element in this court's recent conclusion that that club was not a "private club" within the meaning of 42 U.S.C. Section 2000a(e). *Bell v. Kenwood Golf & Country Club, Inc.*, Civ. No. 20568 (Thomsen, J.) (D.Md. May 13, 1970).

Applying those criteria to Wheaton-Haven, first, Wheaton-Haven has limited membership; no more than 325 family units may be members at one time. Membership rolls are not "open-ended." Second, members do control the association's operation through elected directors. Members or their elected directors approve membership applications. Admittedly the standard by which they determine eligibility for membership is not set forth in corporation's charter or bylaws or in any Board of Directors' resolution; but, since that is the common practice of all clubs, the absence of such an articulated standard does not imply that the only standard is racial. In fact, the only other instance of disapproval of an application involved a white applicant. Third, Wheaton-Haven is member-owned; each member puts up a $375 initiation fee and pays $50 to $60 annual dues to finance the operations of the club, and the members are subject to an additional assessment if the expenses of operation exceed the total annual dues. Wheaton-Haven is not an ordinary business corporation, operated for the profit of a narrowly limited business group. It was not established to promote real estate sales in the area. It is a non-profit corporation operated to provide members

with swimming facilities. Fourth, Wheaton-Haven does not run afoul of the language in *Nesmith v. Young Men's Christian Ass'n* condemning clubs serving all white members within a geographic area. While Wheaton-Haven's charter does create a priority on accepting the applications of persons who reside within three-quarters of a mile from the pool, members are in fact drawn from outside that area. Finally, it should be reiterated that the facilities of Wheaton-Haven are available exclusively to those admitted to the confines of the pool area; neither the pool nor the snack vending machines are open to the public at large.

Therefore, this court concludes that Wheaton-Haven is a "private club" within the meaning of 42 U.S.C. Section 2000a(e) and may engage in the admitted exclusion of Negro members and guests solely on racial grounds.

## 42 U.S.C. SECTIONS 1981 AND 1982 AS BASES FOR RELIEF

Plaintiffs contend that *Sullivan v. Little Hunting Park, Inc.*, 90 S.Ct. 400 (1969), controls the result in this case. In *Sullivan*, a Virginia nonstock corporation was organized to operate a community park and playground facility. Membership shares, which entitled one's immediate family to use the corporation's recreation facilities, could be assigned to the purchaser or lessee of a member. The assignment was, however, subject to the approval of the corporation's Board of Directors. Sullivan, a member, rented his home to Freeman, a Negro, and sought to assign his membership share to Freeman. The Board of Directors refused to approve the assignment. The Virginia trial court denied Sullivan and Freeman relief on the ground that Little Hunting Park was a private social club.

Finding "nothing of the kind on this record," the Supreme Court reversed, stating at 90 S.Ct. 404:

> There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race. . . . What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, by reason of the Fourteenth Amendment.

In concluding that Little Hunting Park's refusal to permit the transfer of membership interfered with Freeman's right to "lease" under 42 U.S.C. Section 1982, however, the Court noted that "[t]here has never been any doubt but that Freeman paid part of his $129 monthly rental for the assignment of the membership share in Little Hunting Park." 90 S.Ct. at 404.

This court has already concluded that Wheaton-Haven is a "private club" within the meaning of 42 U.S.C. Section 2000a(e) and, therefore, permitted to discriminate racially. It would be anomolous indeed to hold that Wheaton-Haven could so discriminate under the Civil Rights Act of 1964, but could not do so under the 1866 Act. A reasonable attempt to effect the Congressional purposes underlying each requires that this court construe the provisions of each consistently. The determination that Wheaton-Haven's discrimination is permitted under the 1964 Act which explicity deals with such a facutal situation should preclude a determinatiion that the same conduct violates the less explicitly applicable principles of Section 1981 and Section 1982. However, this court,

repeating many of the factors outlined in its discussion of the private club exemption of 42 U.S.C. Section 2000a(e), directs its attention to the factors pointed out by the Supreme Court in concluding that Little Hunting Park could not discriminate against Freeman under 42 U.S.C. Section 1982.

First, Sullivan had the right to assign his membership to either the purchaser or the lessee of his property, subject to the approval of the Board of Directors. In contrast, a homeowner who is a member of Wheaton-Haven cannot transfer his membership to his purchaser. The seller's membership (if he has one) is sold back to Wheaton-Haven and the purchaser may apply for membership and have his application considered by the Board of Directors or membership of Wheaton-Haven. And more importantly in this case, Dr. Press' seller had no membership in the pool. Second, the Supreme Court observed that there was no plan of exclusiveness in Little Hunting Park; it was open to all white people in the area. Applications for membership in Wheaton-Haven must be scrutinized either by the Board of Directors or by the membership as a whole. While the criteria for acceptance is not formally set out, at least one white applicant has been denied membership. Third, Little Hunting Park, the Supreme Court concluded, was open to every white person within a given geographic area, there being no other selective element other than race. With Wheaton-Haven, while some priority is given to those applicants who resided within three-quarters of a mile from the pool, the 325 membership limit has never been fully filled, so that members may and do in fact apply from outside the geographic priority area. Fourth, the Supreme Court concluded that board approval of membership transfers was a device "functionally comparable to a racially restrictive

covenant." This court cannot conlude that Wheaton-Haven is such a "device." Membership in the pool is not tied to ownership or tenancy in the land. The pool is not a service or facility to the community as a whole. No purchaser or lessee of property within the three-quarter mile area had any *right* to belong to Wheaton-Haven, nor has his seller or lessor any right to assign his membership to anyone to whom he might transfer an interest in his property. Consequently, there is not even an "expectancy" which would affect the price of any property interest one might acquire either white or Negro, because there are no indicia of pool membership connected with the purchase or leasing of a home. On the basis of these distinctions, this court does not feel bound by the result in *Sullivan v. Little Hunting Park.* Instead, this court concludes that Wheaton-Haven is a "private club" and that membership in it was not an incident of Dr. Press' purchase of a home in the vicinity of the pool such as to be considered a property right within the meaning of 42 U.S.C. Section 1982. Similarly, this court concludes that the refusal of Wheaton-Haven, a private club, to entertain Dr. Press' application for membership does not deny Dr. Press' right to make and enforce contracts under 42 U.S.C. Section 1981.

As to the Tillmans and Mrs. Rosner, this court concludes that, Wheaton-Haven being a private club and, therefore, permitted by "public law" set out in 42 U.S.C. Sections 1981-82 and Section 2000a to engage in discriminatory conduct, members of Wheaton-Haven are bound by the contractual provisions and corporate decisions, *i.e.*, "private law," concerning members. The Tillmans must abide by the Board of Directors' decision to limit guests to relatives of members, even if one of the purposes of the limitation is to exclude Negro guests. Mrs. Rosner's right as a third-party beneficiary of the membership contract

can rise no higher than those of the Tillmans, so she also is bound by the guest policy of the club. Similarly, this court concludes that Mrs. Rosner's reliance on *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), is inappropriate, since this court has concluded that Wheaton-Haven, unlike Timberlake in *Scott v. Young* or Lake Nixon in *Daniel v. Paul*, is a private club. Therefore, Mrs. Rosner's claim of a right to purchase an easement of ingress and egress or her right to contract with Wheaton-Haven for admission as a guest, like Dr. Press' right, fails under either Section 1981 or 1982.

Therefore, defendant's motion for summary judgment is hereby, granted.

/s/ Edward Northrop
United States District Judge

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## APPENDIX D

### ORDER

Upon consideration of the petition for rehearing and of the suggestion for rehearing en banc, the court having been polled and less than a majority of the panel having voted for a rehearing and less than a majority of the court having voted for a rehearing en banc,

IT IS NOW ORDERED that the petition for rehearing and the suggestion for rehearing en banc be, and they hereby are, denied.

For The Court:

/s/ Clement F. Haynsworth
Chief Judge, Fourth Circuit

A True Copy, Teste:

Samuel W. Phillips, Clerk
By Frances S. Sewell
Deputy Clerk